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FORM OF DOCUMENT	CORRESPONDENTS OR TITLE	DATE	RESTRICTION
Memo	Hutcheson to Eizenstat, w/attachments, 8 pp. Re: NEH	1/21/77	C
Memo	Pres. Carter to Knight (USSS), 1 p. Re: Security matters	1/21/77	A

FILE LOCATION

Carter, Presidential Paper, Staff Offices, Office of Staff Secretary, Presidential Handwriting File, 1/21/77 Box 4

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CARTER - MONDALE

TRANSITION PLANNING GROUP

DEPARTMENT OF DEFENSE

WASHINGTON, D. C. 20301

P.O. Box 2600

Washington, D.C. 20013

January 8, 1977

THE PRESIDENT HAS SEEN.

Mr. McGeorge Bundy
President
The Ford Foundation
320 East 43rd Street
New York, New York 10017

Dear Mac:

Thank you for sending me the draft report on the Notre Dame Vietnam Offender Study. The Defense Department Transition Team tells me that it has not been consulted at all by Mr. Berg and the other people working on the pardon issue, so these questions are somewhat new to them as well as to me.

I am generally in agreement with the recommendations you make in the memorandum that you and Father Ted Hesburgh used in presenting the issue to Governor Carter. There are three sets of problems, however, as I see it, that require very careful consideration.

The first set of problems relates to special treatment for certain small groups. I understand that there are some difficulties about this under President Ford's clemency program. For example, I understand there may well be a small number of persons who received bad discharges of one kind or another for problems that arose after they returned from Vietnam, where they had distinguished themselves by their conduct -- there are even a few wounded heroes. How can we assure that such men are justly rewarded by, for example, honorable discharges? A second small group may involve veterans with serious medical problems, some of them service-related, who served well (albeit perhaps not heroically) and then later received bad discharges. We would want to ensure, I would think, that they did not become disadvantaged by some sort of general control on veterans benefits.

A second set of problems involves the administrative implementation following a pardon of military offenders. This seems to me to be an important issue because we need to ensure that, for example, if a new type of discharge is given, it is not provided in such a way that the record of the bad discharge is still part of a veteran's employment records. I understand there have been some problems with the Ford program in this regard as well.

Lipsbury
Gov Carter - Here are my comments to Mac Brundy on Ted Hesburgh's study. I would urge that your request, of whomsoever is handling this for you, more than one option for choice.
Harold Brown

The third, and as I see it the most difficult set of problems, involves the treatment to be afforded generally to holders of undesirable, bad conduct, and dishonorable discharges (points six and seven in your memorandum). As you point out, these categories include persons who have been discharged for all sorts of offenses. On the one hand, as time goes by, easing the lot of those who were merely persistent trouble makers and who were not motivated by opposition to the war becomes less troublesome and has less of a negative impact on military discipline. On the other hand, there may be some way to deal with this very large group -- particularly the holders of undesirable discharges -- that is more selective than just upgrading their discharge to a general one (with some control on veterans benefits) as you suggest. For example, I note that the two military officers whose reactions are described in your second memorandum raise the question of whether the upgraded discharges might be more deserved by the 50,000 men with undesirable discharges who served in Vietnam compared with the 160,000 who did not.

I am interested in being of assistance in this issue. It might be a good first step for either your own staff or the authors of the Notre Dame study to arrange to meet with my transition staff and discuss the questions raised in this letter as soon as possible.

Sincerely,



Harold Brown
Secretary of Defense-Designate

THE FORD FOUNDATION
320 EAST 43RD STREET
NEW YORK, NEW YORK 10017

McGEORGE BUNDY
PRESIDENT

December 27, 1976

Dear Harold:

Here is the draft report of the Notre Dame Vietnam Offender Study that I mentioned to you. I also enclose three additional documents that are marked 1, 2, and 3 in the upper right-hand corners. One is a memorandum that I used when Ted Hesburgh and I first presented the matter to Governor Carter. Number 2 is a memorandum that Governor Carter specifically requested which discusses the reactions of George Brown and Bob Gard to the Notre Dame proposals as outlined orally to me. And number 3 is a letter enclosing two legal memoranda on specific aspects of the problem. The one which may be particularly important to the Defense Department is the one which addresses the question of the relation between the upgrading of discharges and eligibility for veterans' benefits. The point that seems particularly interesting and hopeful to me is that so much can be gained simply by making Presidential policy out of what is now happening de facto. No deserter in Sweden is in fact in danger of any prosecution or pursuit today. And if you simply give him whatever discharge -- undesirable or general -- seems fair to the President, you end the part of his grievances that is legitimate. It would take a lot of nerve to say that someone who quit a service in opposition to what it was doing deserves its Honorable Discharge.

If you or your eventual general-counsel-designate should want further information on this complicated subject I am sure that both the young men at the Offender Study in Washington (address inside the orange book) or our own deeply interested staff would be glad to respond.

As ever,

McGeorge Bundy

Dr. Harold Brown
President
California Institute of Technology
Pasadena, California 91125

cc: Transition Office, The Pentagon

RECEIVED

DEC 29 1976

OFFICE OF THE
PRESIDENT

Jan. 21, 1977

GI 2

PR 7-1

4 Cop

TO: Tim Kraft

FROM: Fran Voorde

RE: BACKGROUND - Robert Fulbright Appointment
3:05 p.m. - Friday, Jan. 21, 1977Purpose: To present Inaugural Edition of
WHY NOT THE BEST, Broadman PressParticipants: Mr. and Mrs. Robert G. Fulbright^x
Mr. and Mrs. Jonnie Godwin
Mr. Jim^x Clark
Mr. Bob^x Harper, Photographer
Baptist Convention

Length: 5 minutes

(Correspondence Attached)

January 21, 1977

Mrs. Carter
Susan Clough
Bob Lipschutz
Harvey Hill
Charles Kirbo
Robert Perry

The President asked that you be sent a copy of the attached memorandum concerning the Financial Rights of the President.

Rich Hutcheson

CARTER - MONDALE
TRANSITION PLANNING GROUP

P.O. Box 2600
Washington, D.C. 20013

Susan
cc: Lipshutz
Rosalynn
R. Perry
Harvey Hill
Kirbo
J.C.

MEMORANDUM

January 8, 1977

TO: Robert Lipshutz

FROM: Joyce Starr

RE: Financial Rights of the President

Salary

President Carter's annual salary will be \$200,000 in taxable income, payable monthly. He will also receive an expense account of \$50,000, which is considered taxable income. The President is required to take withholding on the \$200,000 salary, but has the option to waive this requirement on the \$50,000 expense account. In the latter case, any money owed at the end of the year will automatically become part of his tax liability.

Out-of-Office Compensation

After termination of his service, the President will receive a monetary allowance at the rate of an Executive Level 1 position, currently \$66,000 per year. This allowance will be continued for life unless he returns to government service, whereupon it will be suspended until he leaves this position. Since this is President Carter's only civil service position, his out-of-office monetary allowance will not include related social security benefits.

A former President is further entitled to an additional allotment of \$96,000 per year to cover staff and office expenses, at such a location as he shall determine. He is also entitled to a franking privilege and to secret service protection for life.

ELECTROSTATIC REPRODUCTION MADE FOR
PRESERVATION PURPOSES

Medical Coverage

The President and First Lady are entitled to Blue Cross/Blue Shield medical coverage, and all children age 22 or under. The Blue Cross plan includes a high option premium which will pay the full costs of room and board at a hospital. It is recommended that the President and eligible family members make use of the services automatically extended to them at a military hospital. These include: the free services of a physician; and free medicine. If an emergency should arise requiring the use of a non-military facility, the President or family member involved will be subject to normal Blue Cross costs.

Travel

The military will provide the President and the First Lady the use of Air Force 1 at no charge, as long as the purpose of the trip is government related business. Travel to Plains is viewed as a working trip, as is any vacation travel, but the regulations are less clearly defined with respect to similar travel by the First Lady or members of the Carter family. The President, First Lady, and other members of the family are entitled to use Air Force 1 for all political trips or for purely personal travel needs, but in both cases the government must receive a reimbursement, (traditionally at the rate of a first class air fare). The reimbursement can take the form of a direct payment or become a part of the President's tax liability. Political travel should be reimbursed through a political action committee designated by the President. The military office will handle all billing. Presidents Nixon and Ford opted for direct payment.

Travel expenses for official government business are paid through two accounts. The first is a \$100,000 account to be used exclusively for Presidential travel. This account is not subject to GAO audit. The second account of \$175,000 is to be used exclusively for White House staff travel and is subject to GAO audit. All family travel expenses incurred specifically for government related business will be covered by the \$100,000 account.

Rights of Family Members

Any member of the Carter family that the President so designates may live at the White House. Members of the First Family are also entitled to 24-hour secret service protection. There is no formal limit on the number of staff persons that can be employed to assist members of the family, but these staff costs must be paid from the White House staff budget. White House stationary and stamps will be provided for government-related business* at no cost to family members who require them.

There are no apparent tax consequences involved in having members of the Carter family reside at the White House. There could be tax consequences if a Carter family member should use the Presidential yacht when the President is not aboard. Members of the Carter family are entitled to all privileges extended to the President at Camp David.

A family member of a former President can receive secret service protection until he or she has reached age 16.

The Widow of a former President

The widow of a former President will receive \$20,000 a year until she reenters government service or remarries. She is also entitled to a franking privilege and to secret service protection until she remarries.

Treasury Contacts

For detailed information on the forms which the President is required to fill out, contact:

Mr. Steven Comings, Assistant to the Commissioner, Comptroller of the Bureau of the Treasury, 202 566-2081.

* NOT specifically defined

January 26, 1977

Susan Clough -

R. Perry is -

Mr. Robert Perry
P.O. Box 1224
Americus, Georgia 31709

The President's CPA.

Trudy Fry

Susan Clough -

I tracked down one of the missing
addresses:

Mr. Harvey Hill Jr.
Alston, Miller & Gaines
National Bank Building
35 Broad Street
Atlanta, Georgia 30303

Still no luck on R. Perry --- both
of Mr. Kirbo's secretaries have been out for
the last two days.

Will send it to you when I finally get it.

Trudy Fry 1/25/77

THE PRESIDENT HAS SEEN.

THE WHITE HOUSE
WASHINGTON

C
1-21-77

Dear Hot —

I like your office
& like it —

Good bye!

J. H. J.

Ma

Scrit 1/21/77

THE PRESIDENT HAS SEEN.

Tom Joe
1/12/77

DESIGNING A THREE-TIERED APPROACH
TO WELFARE REFORM

S/n -
Get California
Marshall, keeps, yes,
Joe together to
begin working on
the welfare reform
proposal. Keep me
informed. Include
Congress JC

The following three-tiered approach to welfare reform is presented as additional input into various forums on the subject which are currently underway. This alternative welfare reform proposal and strategy differs significantly from the commonly identified proposals (i.e., Martha Griffiths' Negative Income Tax Plan or HEW's Income Supplement Plan). It has been developed by several people over a period of 2-3 years and is now at the point of conceptualization that it is recognized as a significant option and is included in a comparative analysis of the cost impact of various welfare reform proposals that CBO is about to undertake. Conceptually, it differs from the negative income tax proposals which try to develop a single welfare system in three ways:

1. it is based on the assumption that successful welfare reform must result in fewer rather than more people receiving welfare benefits;
2. it assumes that the first and best welfare reform strategy is a jobs and employment strategy; and
3. it adopts a three-tiered approach utilizing three different but related institutional systems for achieving broad income maintenance reform.

There has been considerable controversy, even among experts who agree on the goals of welfare reform, over the best means to achieve those goals. The two major camps in the debate split over whether to build primarily upon existing program structures and use a multiple system approach or to institute a single new program structure that makes no distinction

between those who are poor, irrespective of the reasons for their poverty. This approach is the former, as distinguished from comprehensive plans developed by Martha Griffiths and within HEW. I have taken this approach deliberately and my reasons are both programmatic and political. I believe that there is considerable value both in terms of promoting individual human dignity and in terms of political viability of distinguishing between people who can work and people who can't work and using a manpower system as the first line of defense against poverty. While some strategically argue that if welfare becomes more inclusive (i.e., subsumes employable but unemployed adults and the working poor) it will become more acceptable to the public, I do not believe this to be the case. In my opinion, welfare will remain unpopular as long as we try to subsume other problems (i.e., unemployment) under the welfare umbrella and successful welfare reform must result in smaller caseloads of people who cannot be expected to work.

In addition, I oppose a single comprehensive plan because it pits those who are able to work against those who can't work in terms of benefit levels and cost. If you try to design a single system which has a benefit reduction rate sufficient to maintain a work incentive for the working poor, you end up with a low minimum benefit level for those who do not have any earned income, the very population that is the most vulnerable and in need of our support. Although a single system does respond to objectives of simplicity and equity, the work incentive provision has in the past created serious technical and philosophical hang-ups which are best solved by a multi-system approach.

This strategy is not built around the concept of perfect work incentives and singular uniformity, but moves toward the same welfare reform objectives in a different way. This approach recognizes what, in my opinion, are serious political and fiscal constraints against a uniform, perfectly structured incentive-based system and substitutes a three-tiered system geared to different needs of the poor population while a unitary approach

assumes that people function totally based on economic incentives, this approach philosophically differs and assumes that individual behavior is governed as much by other socio-cultural variables like the desire to be a productive member of society. This means that while the direction must be to reduce the existing disincentives to work, the need to provide positive economic incentives in every instance should not govern our welfare reform strategy.

With those assumptions in mind, the following three-tiered strategy is proposed:

- Manpower Track

A program for those who can be reasonably expected to work through the restructuring, expansion and integration of the present State Employment Service job placement activities, the training and job creation programs under the Comprehensive Employment and Training Act (CETA) and the Unemployment Compensation program, coupled with a full employment policy supported, if needed, by expanded public service employment opportunities. Unemployed persons on this manpower track would be eligible for a Supplementary Unemployment Insurance Benefit (SUIB) subject to a means-test and limited to one benefit per family, varied by family size.

- Tax Reform for the Working Poor

The provision of supplemental income assistance to the working poor through reform of the federal income tax system to insure that, in general, no one is better off receiving welfare or SUIB than they would be by working. The most feasible way of accomplishing this is through expansion and liberalization of the existing earned income tax credit. The existence of the earned income tax credit in current law establishes an appropriate precedent to build upon.

- Welfare Track

Welfare would be returned to its original concept of income support for persons who cannot be expected to work and their families. The determination of unemployability would be based on objective criteria including number of parents and ages of children, age of recipient, prior work history, education, health status and disability status. This smaller, residual welfare program would be altered to insure a federally financed national minimum payment level which would provide a decent standard of living.

Basically, this three tiered proposal is designed to:

1. provide income support through cash grants and public service employment to those who can and should work, but who are not now working;
2. provide income support through the current tax system to those who work but whose resulting incomes do not allow them to rise above an established minimum level; and
3. provide income support through the current welfare system for those who cannot or should not work.

Each of the three systems is described in more detail below:

I. The Manpower Track

This proposal would undertake on total restructuring of the way we help persons who are unemployed. Currently, those persons who have had a covered job prior to the loss of employment have been able to receive unemployment compensation benefits for up to 65 weeks. Others who have had a covered job prior to the loss of employment have been able to receive unemployment compensation benefits for up to 65 weeks. Others who have exhausted their UI benefits or who were not in covered jobs have been forced to go on welfare. Neither group has been very well served by State Employment Services in finding new jobs and both groups suffer from the lack of access to manpower, training and job development programs.

It is therefore proposed that all unemployed persons be provided for through a manpower track which links unemployed persons to the labor market and jobs, as well as to manpower training services and public service employment. In terms of income support for unemployed persons, it would come from one of two sources. A first line of defense for those who are eligible based on past work history would be receipt of regular UI benefits financed by the UI Trust Fund. For those who have exhausted their UI benefits or who are ineligible, a Supplementary Unemployment Insurance Benefit (SUIB) would

be provided, limited to one person per household and means-tested using, for example, 150% of the poverty level household as an income eligibility standard. Persons receiving an SUIB grant would be required to accept job training and placement in suitable private employment or public service employment. It must be underscored that everyone who wants to will be eligible for manpower and employment services, although receipt of income support would be limited for obvious fiscal reasons. Specifically, conditions governing income support under the manpower track would be as follows:

- FILING UNIT: • Household, similar in definition to current food stamp program filing unit.
- ELIGIBILITY: • General coverage includes those households in which all individuals are unemployed and at least one able bodied adult is capable of working (expected to work).
- Asset test similar to current food stamp program.
- Special Unemployment Insurance Benefit (SUIB) would be available to only one person per household. This person must be either unemployed, a new entrant or reentrant to labor force, or a regular unemployment insurance exhaustee. Household income test for SUIB eligibility.
- Regular Unemployment Insurance (UI) would be continued with an expansion of coverage to domestic and agricultural workers as specified under H.R. 10210.
- Public Service Employment (PSE) would be mandatory for one person per SUIB household.

BENEFIT
STRUCTURE:

- The SUIB benefit would be adjusted for family size and state average weekly wage variations. Households would remain eligible for food stamps. Earned and unearned income would be taxed 100 percent against SUIB. Depending on total cost, national average benefits would be approximately \$4,200 a year for a family of four.
- UI would remain as in current law and would be provided for a maximum of 52 weeks. Households would remain eligible for food stamps. UI benefit would remain non-means tested.
- PSE recipient would receive the minimum wage. At the current rate of \$2.30 per hour, this would be approximately \$4,025 on an annual basis. At \$2.50 per hour, the annual income would be about \$4,550 per year. Households would remain eligible for food stamps.

The obvious additional element which will make the manpower program work is the availability of jobs and job training. The Activities of State Employment Services must be integrated with expanded training and job creation programs under the Comprehensive Employment and Training Act (CETA) program and supported by revitalized, reorganized placement activities of State Employment Services. All unemployed persons who have skills must be helped through the state Employment Service to gainful employment and economic independence. There are 2,800 Employment Service offices and more than 80,000 staff in place right now to take on this job. People without skills must be enrolled as soon as possible in the local CETA manpower programs, when job market demand indicates that work suitable to the individuals will be available following training. CETA manpower programs will have to become more expansive and imaginative in dealing with a wide range of employment problems, including those that require the creation of public employment jobs in order

to provide the necessary work experience for certain people to obtain private sector jobs. In addition, it must be emphasized that an essential backdrop to this strategy is a vigorous employment policy with provisions for public service employment, if needed, to supplement private sector job opportunities. However, about 450 CETA programs, covering every square mile of the United States, are currently operating and could marshal their resources behind this initiative. This explicit emphasis on the manpower and jobs component of an income support strategy is a significant difference from the other welfare reform proposals which assume separate but parallel manpower programs such as the WIN program.

II. The Working Poor - Tax Reform

The working poor do not really fit, financially or conceptually, with either the unemployed or the residual welfare group. The critical difference is that, for the working poor, the problem is one of supplementation of earned income, not the provision of a permanent benefit, nor the provision of a temporary benefit linked to prior standing with the labor force. Indeed, the primary purpose of supplementation must be to ensure that working will never place people at serious disadvantage relative to receipt of unemployment benefits on welfare. It would be totally counter-productive to gloss over the differences and arbitrarily wedge the working poor into either the unemployed status or the welfare system in the interests of superficial simplicity.

The importance of supplementing the incomes of working poor is critical also from the standpoint of equity. The working poor are often unfairly burdened through the payment of both income and social security taxes which provide income benefits for others whose total incomes may be equal or only slightly lower than theirs. This is one of the reasons for the hostility of some low wage earners toward welfare recipients. The suggested approach toward relieving the working poor and supplementing their incomes is reform of the tax system. The tax system ought to be better coordinated with our assistance programs and more consciously used to further income security objectives. When all forms of taxes are taken into account, the poor and near poor pay an average of approximately a quarter of their income in taxes - as much or more than most wealthier people. Under this proposal, incomes of the working poor would be supplemented by the provision of food stamps and an earned income tax credit. The existing earned income tax credit could be liberalized and expanded to include single people and childless couples as well as families and would provide simple, equitable and efficient means of distributing tax relief and raising the incomes of the working poor, while at the same time reducing their need to rely upon other income assistance programs. Structurally, the characteristics of this system of support would be as follows:

FILING UNIT: • Household, similar in definition to current food stamp program filing unit.

ELIGIBILITY: • General coverage includes all households in which at least one person is working. Households with at least one person working part time, seasonal or otherwise on a nonpermanent basis are also eligible.

DEFINITION
OF INCOME: • Includes all earned income less taxes paid, less 10 percent of earnings up to a maximum of \$1,500 and an allowance for child care expenditures as specified in Tax Reform Act of 1976, P.L. 94-155.

BENEFITS: • Benefits would be provided through an expansion of the earned income tax credit to single people and childless couples. Benefits would be paid based on an adjusted tax rate such that working households would always receive larger total benefits than the non-working poor and welfare track households. Households would continue to be eligible to receive food stamp benefits. Tax credit rates on earned income would vary by amount of earned income and family size to guarantee a maximum total income exceeding total benefits provided to the non-working poor or welfare families. The income level to which the tax credit applies and the exact tax credit rate can be established to meet aggregate cost objectives.

III. The Welfare Track

The welfare system should serve only those who cannot work and should be reinstated as the last line of defense against poverty. They include the blind, the disabled and aged and generally the single-parent families with young children, and others whose health and educational characteristics render them permanently or temporarily unemployable. These people who are unable to work because of their life circumstances require an income support system which will provide them a decent standard of living in an equitable, efficient and timely manner, and this should be the only function of a residual welfare system. The determination of who is unable to work has recently been raised as a serious technical problem with this approach. This is not justified in my opinion and is a smokescreen based on little knowledge of existing programs. We, in fact, make this distinction all the time in many different programs (i.e., CETA, WIN, VR). No doubt, we can refine the methods used and devise a simpler system, but it does not present an insoluble obstacle and is in fact easily accomplished.

In order to achieve this objective, the current Federal, state and local patchwork of AFDC and general assistance programs needs to be changed. The Federal Government should eventually bear the financial costs of providing this basic income support, but this can be phased in over several years. Many state and local governments do not have the resources, especially during economic downswings, to provide adequate basic levels of assistance. While the Federal Government should move to phase-in full Federal support of a basic minimum payment, there should, however, be a continuing strong role for states and localities in providing services essential to complement the basic income support and to meet special needs that cannot and should not be adequately met in a nationally uniform program structure.

Welfare assistance should be provided in a way that fosters the dignity and independence of recipients, as does our present Social Security system. Minimum criteria for eligibility should be nationally established and the determination of benefit levels should be as simple and objective as possible, relating primarily to family size and income.

If an individual's circumstances are altered or if through vocational rehabilitation or other services he becomes employable, he would be transferred from the welfare system to the manpower program for unemployed persons.

Structurally, the welfare program should be designed as follows:

- FILING UNIT: • Household, similar in definition to the food stamp program filing unit.
- ELIGIBILITY: • General coverage includes all households who cannot or should not work. Among those included in this category would be single parent families with dependent children under the age of six, single unrelated individuals who are sick, disabled or aged. (Population would also include current SSI universe of single individuals and couples, as well as dependents of current or eligible SSI recipients).
- Other characteristics for determining nonemployability as the number of children, education, age of head, work history, and availability would also be used as criteria for eligibility.
- Households would be subject to an asset test similar to current food stamp program.
- BENEFITS: • Benefits would be established at a fixed percent of poverty, or a fixed percentage of state median incomes to capture regional variations in costs of living. Depending on total costs, benefits would be pegged at between 75% and 100% of poverty or a percentage of median income to reach a similar average figure.

IV. ISSUES REQUIRING SPECIAL EMPHASIS

1. The work-welfare proposal is a forthright attempt to realign and change the tax and the manpower systems and to use them as the first line of defense against welfare. This means that the proposal explicitly draws the relationship between jobs, the income needs of low wage earners and welfare. Every other welfare proposal also has to deal with jobs and the working poor as well, but the other prominent proposals do it in only an indirect manner. The programmatic and fiscal strategy of this proposal is to make manpower and tax reform relevant to the welfare problem. We will be spending new money in these areas anyway and we must forge the link to welfare so that the tax relief and manpower reforms work to reduce the burden and costs of direct welfare aid. The costs of the proposal attributable to welfare should only be the cost of providing an income to those people who cannot work.
2. The proposal has been criticized by some NIT advocates as creating arbitrary distinctions and classifications of the poor population. It is an unfair rap to put that charge on this proposal. Existing law and practice builds in inequities between the dependent and working poor in incentives that apply differentially, etc. In addition, the distinction between those who can and those who can't work is made all the time in CETA, WIN, VR, etc. All of the other welfare reform proposals will similarly require that distinction because they include a work requirement for the able bodied. The significant difference however is that current practice makes the distinction but then creates a separate work program for the welfare population, i.e., WIN. This approach recognizes the fact that not everyone can work, but for those who can, attempts to maintain them within the mainstream of the economy.

3. A frequent issue raised is the ability to design a three-tracked system which preserves equity among the three programs while at the same time retaining an incentive for persons to be on the manpower or working track. It turns out, as we have been working to further develop the specifics of program design, that it is a fairly easy task to obtain relative parity among the benefits on the three tracks as well as to insure that working is always more profitable than not working.
4. A related criticism is that there will be constant and administratively cumbersome movement between persons on the three tracks. Obviously, this proposal does not appeal to people who like neat, simple solutions. It cannot nor should not be claimed that every person will easily fit forever in one track or the other. People's conditions change and their needs will be met accordingly. However, this is a problem in any system (i.e., accounting period problems in an NIT proposal). We can only expect these changes in some instances and develop the administrative mechanisms and delivery systems to accommodate them. It must also be recognized that these cases are the exceptional ones, and not the bulk of the caseload.
5. The approach discussed in this paper is a conceptual approach with some aspects of specific program design. It must now be taken further and fully designed. Once specific design criteria are articulated, we can begin to develop cost and population estimates that are realistic and can further manipulate the design and develop alternative design options based on aggregate costs and caseload projections. This is a critical next step to which I am now devoting my efforts.

SUMMARY

In summary, the proposed approach is advocated as a means of making the welfare system a transitional program to economic independence instead of an institutional trap for those who can and want to work for a living. The approach will not produce an instant panacea, but it does have a goal which can be shared by us all, eliminating poverty and providing people with the means and support to live their lives in a way that permits dignity and self-respect. By recognizing that those who require income assistance are a diverse group and by tailoring a national effort to meet their needs, this proposal offers an honest and realistic hope of success. The major national institutions needed to make my plan work are all in place - but they are currently so badly misaligned that they actually work at cross purposes and impede our ability to solve this major national problem. I want to emphasize that the programs I propose to restructure don't need to be made much bigger -- they need, instead, to work much better and to work on behalf of the people they are designed to serve. We must be careful not to create a huge welfare bureaucratic monster to pick up all of society's ills, but should instead force our other social institutions to work toward a similar objective.

THE WHITE HOUSE

WASHINGTON

January 21, 1977

MEMORANDUM FOR:

BOB LIPSCHUTZ

FROM:

RICK HUTCHESON

SUBJECT:

Establishment of United States
Circuit Judge Nominating
Committee

The attached letter was returned in the President's outbox with the following notation:

"Proceed immediately. Keep me
informed."

Please note notations on attachment and follow up with appropriate action.

To Lipshutz
Proceed immediately
Keep me informed
J.C.

MEMORANDUM TO: Governor Carter

I enclose material relating to establishing United States Circuit Judge nominating committees by executive order. Let me know when you are ready to move. You will need to be selecting nominees.

You should carefully note the enclosed memorandum on the Federal Advisory Committee Act as it will impede your use of non-government committees.

Griffin Bell

Griffin B. Bell

GBB:fc

Enclosures

January 10, 1977

JAN 6 1977

TO: Griffin Bell
FROM: Phil Jordan

Attached are:

- (1) A draft of an Executive Order establishing United States Circuit Judge Nominating Committee.
- (2) A draft of an Executive Order naming the members of the Committee for the 6th Circuit. (The Office of Legal Counsel has informed me that Executive Orders are not necessary in order to name the members of the Commissions; simple letters to the new Commission members should suffice. I have included a draft of an Executive Order on the 6th Circuit, nevertheless, just in case you and the President-elect want to use this procedure.)
- (3) A memorandum from me concerning the Nominating Committee, with attachments.

Executive Order _____

January __, 1977

Establishing United States Circuit Judge
Nominating Commissions

The fair administration of justice by strong and independent federal courts is essential to the protection of the rights and freedoms of all Americans and to the maintenance of government under law. In addition to the reality of fairness, strength and independence, the appearance of those qualities in federal courts is necessary to insure public acceptance and support of the constitutional role of the federal judiciary as a coequal partner in the governance of our Nation.

Under Article II, Section 2 of the Constitution, the power to nominate and, with the advice and consent of the Senate, to appoint federal judges is vested in the President. In exercising this constitutional power I am committed to seeking out and nominating only persons whose character, experience and ability fully qualify them to serve as federal judges. Nonpartisan selection of judges on the basis of merit, without regard to race, sex, color, creed, national origin, or previous political party affiliation, is essential to the reality and the appearance of integrity that are required to permit the judiciary to play its assigned

role in our constitutional system.

In the selection of nominees for judgeships on the United States Courts of Appeals, I believe my commitment can best be implemented through using in aid of my constitutional discretion several nonpartisan commissions of outstanding citizens whose task shall be to seek out and recommend for nomination persons who are well qualified to serve in those positions.

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, and as President of the United States, I hereby order as follows:

Section 1. Establishment of the Commissions. There are hereby established in the eleven judicial circuits of the United States, as constituted under 28 U.S.C. 41, a number of United States Circuit Judge Nominating Commissions (hereinafter referred to as "Commissions") as more fully set forth in Section 2 of this Order.

Section 2. Number of Commissions per Judicial Circuit.

(a) In each of the judicial circuits excepting the Fifth Judicial Circuit and the Ninth Judicial Circuit there is established one Commission to be composed of persons residing within the States and Territories comprising the Circuit. Each of these Commissions shall be designated

the United States Circuit Judge Nominating Commission for the _____ (e.g., First) Circuit.

(b) In the Fifth Judicial Circuit there are established two Commissions. One shall be composed of persons residing in Alabama, Florida, Georgia and Mississippi, and shall be designated the United States Circuit Judge Nominating Commission for the Eastern Fifth Circuit. The second shall be composed of persons residing in Louisiana and Texas, and shall be designated the United States Circuit Judge Nominating Commission for the Western Fifth Circuit.

(c) In the Ninth Judicial Circuit there are established two Commissions. One shall be composed of persons residing in Arizona, California and Nevada, and shall be designated the United States Circuit Judge Nominating Commission for the Southern Ninth Circuit. The second shall be composed of persons residing in Alaska, the Territory of Guam, Hawaii, Idaho, Montana, Oregon and Washington, and shall be designated the United States Circuit Judge Nominating Commission for the Northern Ninth Circuit.

Section 3. Composition of Commissions, Appointment and Terms of Members. (a) Each Commission shall be composed of a Chairman and other members to be appointed by

the President. Every Commission shall include at least one member from each of the States comprising the geographic area within which the Commission is located. Additional members of a Commission shall be appointed from any State or States within the geographic area in such number as deemed necessary to assure that the Commission includes approximately the same number of lawyers and nonlawyers, and a representative number of women and members of minority groups: Provided, that no Commission shall have more than eleven members including the Chairman.

(b) The terms of the Commission members, including the Chairmen and including both original members and such members as may be appointed to fill vacancies, shall be coterminous with the term of the President.

Section 4. Functions of the Commissions. It shall be the duty of the Commissions to assist the President in carrying out the intention expressed in the preamble to this Order. Upon notification to its Chairman that the President desires its assistance in finding a nominee to fill a vacancy on a United States Court of Appeals, a Commission shall:

(a) Give public notice of the vacancy within the relevant geographic area, invite suggestions of potential nominees, and conduct inquiries to identify potential

nominees;

(b) Conduct investigations to identify those persons among the potential nominees who are well qualified to serve as a United States Circuit Judge; and

(c) Within sixty days of the President's notification to the Chairman, present to the President the names of the five persons whom the Commission considers best qualified to fill the vacancy.

Section 5. Standards for Selection of Proposed Nominees.

(a) Before transmitting to the President the names of the five persons it deems best qualified to fill an existing vacancy, a Commission shall have determined:

(1) That those persons are members in good standing of at least one state bar, and members in good standing of any other bars of which they may be members;

(2) That they possess and have reputations for integrity and good character;

(3) That they are of sound physical and mental health;

(4) That they possess and have demonstrated outstanding legal ability;

(5) That their demeanor, character, and personality indicate that they would exhibit judicial temper-

ament if appointed to the position of United States Circuit Judge.

(b) In selecting persons whose names will be transmitted to the President, a Commission shall consider whether the training, experience, or expertise of certain of the well qualified individuals would help to meet a perceived need of the court of appeals on which the vacancy exists.

(c) In judging the qualifications of potential nominees and in selecting the persons whose names will be transmitted to the President, a Commission shall disregard the race, sex, color, creed, national origin, or political party affiliation of persons under consideration.

Section 6. Ineligibility of Commission Members. No person shall be considered by a Commission as a potential nominee while serving as a Commission member or for a period of one year after termination of such service.

Section 7. Travel Expenses, Personnel, Financing.

(a) While engaged upon the work of a Commission, a member of the Commission may receive travel expenses, including per diem in lieu of subsistence, as authorized by law (5 U.S.C. 5703) for persons intermittently employed in the government service.

(b) The General Services Administration may furnish

Bob - I prefer all
staff to be located in
Washington - preferably in
Justice dept. - see me -
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to a Commission necessary staff, supplies, facilities and other administrative services on a reimbursable basis. To the extent permitted by law, ^{and after receiving approval by the _____,} the Chairman of a Commission also may appoint and fix the compensation of such personnel as may be necessary to enable the Commission to carry out its functions, and may obtain services in accordance with the provisions of 5 U.S.C. 3109.

(c) All necessary expenses incurred in connection with the work of the Commissions shall be paid from the appropriation for "Unanticipated Needs", in the Executive Office Appropriations Act, or from such other funds as may be available.

Jimmy Carter

The White House,
January __, 1977

Naming the Members of the United States Circuit Judge
Nominating Commission for the Sixth Judicial Circuit

WHEREAS, Executive Order _____ of January __, 1977, established thirteen United States Circuit Judge Nominating Commissions (hereinafter referred to as "Commissions") to assist me in exercising my constitutional power of nominating persons to fill vacancies on the United States Courts of Appeals; and

WHEREAS, that Executive Order states that each Commission shall be composed of a Chairman and other members appointed by me, the total number of members including the Chairman not to exceed eleven; and

WHEREAS, that Executive Order states that each Commission shall include at least one member from each of the states comprising the geographic area within which the Commission is located, with additional members to be appointed in the number necessary to assure that the Commission includes approximately the same number of lawyers and nonlawyers, and a representative number of women and members of minority groups; and

WHEREAS, there now exists a vacancy on the United States Court of Appeals for the Sixth Circuit requiring me to exercise my constitutional power of nominating a person to serve

as a judge of that Court;

NOW, THEREFORE, by virtue of the power vested in me as President, and pursuant to Executive Order _____, I hereby order that _____, of _____ (State) _____, serve as Chairman of the United States Circuit Judge Nominating Commission for the Sixth Circuit, and that the following persons serve as additional members of that Commission:

(Here list ten (10) names, with home states.)

Jimmy Carter

The White House,

January __, 1977

TO: Griffin Bell

FROM: Phil Jordan

RE: Proposed System for Merit Selection of Court of Appeals Judges

This memorandum highlights a few significant points about the proposed system embodied in the draft Executive Order.

I. Composition of Commissions, Reimbursement of Members, Staff

The proposal limits a Commissions' size to eleven persons in part because of the experience of Governor Carter's nominating commission in Georgia. That commission initially consisted of sixteen persons and soon thereafter grew to eighteen; after two years of operation, however, it was cut to ten persons because of the experienced difficulty of assembling sixteen and then eighteen persons at a given time and place. (Eleven members are suggested, instead of ten, so that a vote of a full Commission will not end in a tie.)

An additional reason for limiting a Commission to eleven persons is the need for it to operate as a collegial body. Courts and other bodies have found it difficult to operate collegially with more than ten or eleven members.

The proposal requires at least one Commission member from each state within a circuit. This seems necessary for purely political reasons. The provision for "at large" members in addition to the minimum one-per-state will permit the President to weight a Commission to reflect relative populations of different states, or to insure minority and female representation without offending the establishment bar of a state by having only a minority or female on the Commission from that state.

The proposal permits the President some flexibility in the total number of Commission members, up to a maximum of eleven. There is no overriding reason, however, to create Commissions of different sizes; moreover, using eleven Commission members even in small circuits would give the President greater leeway in weighting the Commission to reflect population differences, and in insuring minority and female representation.

The proposal makes the terms of all Commission members coterminous with the President's term in order to emphasize that the Commissions are the representatives of the President rather than of the Presidency. This arrangement also conforms to the arrangement under Governor Carter in Georgia, where upon the end of his term his commission was retired and Governor Busbee promulgated a new Executive Order and appointed new commissioners.

Presidential appointment of all Commission members, as provided in the proposal, is necessary for several reasons: (1) these are, after all, the President's Commissions, created to assist him in performing his constitutional duty of nominating judges; (2) complete presidential control over appointment gives the President the power to insure a proper "mix" of establishment and nonestablishment lawyers, lawyers and nonlawyers, men and women, blacks and whites, etc; and, (3) permitting other institutions to nominate some members could cause delay in putting the Commissions into operation at a time when the need to get them underway is urgent.

The process of appointing Commission members should not be formalized. The President should ask the obvious sources (Senators, bar associations, etc.) for suggestions, consult with those persons in the various circuits in whom he has confidence, and pick his persons. As vacancies occur on the Commissions a similarly informal operation should produce replacements.

The proposal provides for travel expenses and per diem allowances for Commission members, but not for any salary. The Chairman of Governor Carter's nominating commission in Georgia suggested that the Commission members should not even receive travel expenses and per diem allowances; in his view they should be honored to serve and should sacrifice financially in the public interest. This was the case in Georgia, where commissioners paid their own way, but it may be unrealistic on the national level. Moreover, informal inquiries at the Office of Legal Counsel turned up the point that the Executive Office probably is not empowered to accept "gifts" of personal services that extend to the point of refusing reimbursement for expenses. (There is statutory authorization for persons to serve the Executive Office for no salary, or as "dollar-a-day" people, with reimbursement for expenses.)

*Job
not in
expenses
only -*

The Executive Order states that expenses of the Commissions should be paid from the appropriation for "Unanticipated Needs". This was originally a \$1 million appropriation, and informal inquiries at the Office of Management and Budget revealed that about \$950,000 remains. Much of this sum is likely to be used for the transition at the White House, however, so it may be necessary to look elsewhere for funds before the next budget is passed. The only other White House appropriation that possibly could be used would be the "Salaries and Expenses" appropriation, Pub. L. 94-363, 90 Stat. 966. I was unable to find out how much of the \$16,530,000 in this item might be available for Commission expenses. If neither of these funds suffices for Commission expenses, it will be necessary to direct an agency to fund the Commissions. (For example, the Justice Department might be able to pay Commission expenses out of its appropriation for "Legal Activities: Salaries and Expenses, General Legal Activities", Pub. L. 94-362, 90 Stat. 943.) Some of the expenses of the Commissions' support staff could be met by detailing personnel to the White House on a temporary basis from other agencies, under 3 U.S.C. 107, with the detailing agency still responsible for salaries.*

If the Commission is funded from either the White House "Unanticipated Needs" appropriation or the White House "Salaries and Expenses" appropriation, support personnel probably can be hired by the Commissions themselves and paid without regard to Civil Service regulations (because of very broad language in the appropriations statutes). If those funds are not used, it appears that all hiring of support personnel will have to be done by a federal agency or the White House rather than directly by the Commissions. The support personnel still could be hired without regard to the Civil Service competitive schedules, however, if the personnel qualified as "temporary workers": (1) employees at any GS level can be hired for up to thirty days without prior Civil Service approval (and for longer periods with approval), and without meeting the Civil Service standards for the job they are performing; and, (2) employees at the GS-7 level or

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*Of course, the White House could seek a supplemental appropriation to cover all expenses of these Commissions.

below (which would include most secretaries or clericals) can be hired for up to 700 hours without prior Civil Service approval, although they still must meet Civil Service standards (e.g., typing ability) for the jobs they are performing. If employees were hired for longer than these "temporary" periods, they would have to meet Civil Service requirements and come through the competitive service. (This may not be true for lawyers hired to assist the Commissions; they probably would qualify as "experts or consultants", who can be hired for "intermittent service" under 5 U.S.C. 3109 without regard to laws or regulations governing employment in the Government service.)

II. Outline of Procedures to be Followed by Commissions

The proposal indicates that the President's only role in the selection process, prior to his actually choosing the nominee from the list submitted by the Commission, will be to notify the chairman of a Commission of the existence or the future existence of a vacancy. This is the way the Georgia system worked: Carter simply sent a letter to the commission chairman informing him of a vacancy and requesting the commission swing into action. (In Georgia, Governor Carter did include with the letter, without comment, a list of names which had been brought to his attention as potential nominees to fill the vacancy. The President probably should not include such a list in his notification to the Chairman of a Commission, for (1) he is not likely to know personally very many potential nominees in a circuit, and any names that come to his attention probably would come from pressure groups; (2) the Commission, not knowing the President personally as well as the Georgia commission did, could interpret the President's inclusion of such a list as subtle pressure to include at least one of the names on its own list that it later must submit to the President; and (3) the press probably would try to make something sinister out of the President's inclusion of such a list.)

The Chairman of the Commission should be responsible for publicizing the vacancy within the circuit. This would include notification of all news media, and letters to all bar associations, all federal judges, all or selected law firms and lawyers, the Senators and Congressmen from states within the circuit, and the Governors of all states within the circuit. The letter also should go to appropriate non-establishment institutions such as poverty law centers, black organizations, women's organizations, and so on, but these would differ within each circuit.

In his notifications the Chairman should set a time limit for the submission of names to the Commission, and request that names be submitted to a central office rather than given directly to commissioners. To avoid the appearance or the actuality of influence upon a commissioner before the screening process could begin, any commissioner to whom a name is given should refer that name to the central office and emphasize to the source of the name that the commissioner can do nothing more until the formal screening process begins.

When the deadline for submission of names has passed, the Commission immediately should send out detailed questionnaires to everyone whose name was submitted, with a request that the questionnaire be returned by a certain date. Both the Chairman of Governor Carter's Georgia commission and Professor Meador emphasized the usefulness of such a questionnaire as both (1) a basis for preliminary screening by the Commission, and (2) a self-screening device (since some persons will show their lack of interest by not returning the questionnaire, and others will decide that they lack the necessary qualifications).

When questionnaires have been returned, the Commission should contact by telephone or in person those individuals who could contribute information on the qualifications of the persons still in contention. Although it would be impossible to set strict guidelines on who should be contacted in the case of every potential nominee, there should be some list of minimum contacts to be made in every case, with the Commission free to use its discretion in adding to the list based on the particular circumstances of a given potential nominee.

When the questionnaires and the contacts with persons acquainted with the potential nominees have narrowed the field to a manageable list of serious candidates, the Commission should conduct personal interviews with each of those candidates. Both the Chairman of Governor Carther's Georgia commission and Professor Meador emphasized the importance of such an interview, at which the nominee could and should be questioned searchingly about his or her motivation for seeking the nomination and about any negative matter turned up in the Commission's investigations.

Upon the completion of this whole process, the Commission should vote on the candidates and choose five names to be submitted to the President. (Five -- the number submitted to Governor Carter in Georgia -- seems reasonable. It is a number small enough to insure that real screening has occurred, yet large enough to permit the President some flexibility in choosing his nominee.)

The Commission should forward with the five names all of the supporting papers generated in the Commission's investigations, as well as a short memo stating the reasons for each person's being found among the top five. Reasons may of course include a proposed nominee's personal and professional qualifications, but they also may include the peculiar manner in which a person "fits" with a court of appeal's needs of the moment.

The Executive Order does not state whether the President will be "bound" to choose his nominee from the list submitted by the Commission. Nor should the Order address this question, since its sole purpose is to set up the procedure by which names get submitted to the President. Governor Carter has stated publicly (in the October 1976 ABA Journal) that he always chose from the list submitted by his Georgia commission. A public commitment by the President-elect to do so in the case of these new Commissions would underscore the nonpartisan, merit-based nature of the new system; but the President may not be able constitutionally to "delegate" his ultimate nominating duty in this manner.

The issue of how to deal with the Senate "blue slip" practice must be faced at the point when the President chooses his nominee. There are basically three choices for the President: (1) consult the Senators from all states in the circuit about all five persons submitted by the Commission, and consider the Senators' reactions in selecting his nominee; (2) settle tentatively on a nominee, then check discreetly with the Senators from the nominee's home state to see if they accept the nominee; and (3) select his nominee, forward his name to the Senate, and let the chips fall where they may. Although the third choice is most consistent with the idea of merit selection and with the President's constitutional duty to nominate, the most practical solution to this problem -- the one least likely to ruffle the Senate -- is number two.

There is some question of whether documents on the nominee should be sent to the Senate Judiciary Committee for its use in confirmation hearings, and if so which ones. Professor Meador emphasized that sending to the Committee everything generated by the Nominating Commission could cause a Commission's sources to dry up for fear of publicity and could subject many persons to embarrassment and undesired publicity. At most, a summary of the substance of a Commission's findings should be sent to the Committee.

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no

III. Steps to be Taken, Decisions Necessary

Attached to this memorandum are several documents for your review:

- (1) A list of five decisions to be made or steps to be taken prior to putting the Commissions into operation, prepared by Professor Meador.
- (2) An explication of the standards for selection found in Section 5 of the draft Executive Order. This document also was prepared by Professor Meador.
- (3) A memorandum on the problems caused, and the decisions necessary, as a result of the Federal Advisory Committee Act.
- (4) A memorandum from Professor Meador addressed to Griffin Bell.

DECISIONS AND STEPS NECESSARY TO IMPLEMENT PLAN
FOR UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSIONS

1. A nationally uniform set of written instructions should be provided each commission. These instructions should spell out in greater detail than the executive order the procedures to be followed and the factors to be considered in applying the standards for selecting proposed nominees. *ok*

2. A nationally uniform questionnaire should be prepared and each commission should be directed to submit a copy of it to each person to be considered. *ok*

3. A decision should be made about the staff support to be provided each commission. There are two forms of part-time support needed: (a) clerical, for the handling of correspondence, questionnaires, and files; (b) investigatory, to assist the commissions in gathering information about the persons it will consider. This task might be performed well by a retired or semi-retired lawyer of good professional standing. *see me on this JC* *ok*

4. A decision should be made about the role of the ABA Committee on the Federal Judiciary, after consultation with the chairman of that Committee. A suggested plan: When the commission has reduced the potential nominees to a short list of say six or eight serious prospects the ABA Committee could be asked confidentially for an informal report on each; this would be taken into account by the Commission in selecting its five proposed nominees. *dangerous (confidentiality)*
After submission to the President, the Committee would be asked to give a formal rating on each of the five proposed nominees. This roughly parallels present practice. *??*

5. At least one lawyer should be designated to be directly responsible to the President for overseeing the work of the Commissions and assisting the President in selecting his nominee.

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Explication of the "Standards for Selection of
Proposed Nominees", Executive Order _____, Section 5

In applying the standards set forth in Section 5 of
Executive Order _____, the Commissions should be guided by
the following considerations:

1. Integrity and Good Character. A proposed nominee
must be, and must have a reputation for being, ethical and
honest (both intellectually and financially) and must be well
regarded in the community as a person of integrity and good
moral character.

2. Sound Physical and Mental Health. A proposed
nominee must be physically and mentally capable of sustained
work on difficult intellectual problems. The person must
be free of physical, mental, or emotional difficulties
that would be likely to impair that capability.

3. Outstanding Legal Ability. A proposed nominee must
be a member of the bar in good standing and must have
a demonstrated professional competence, which includes an
ability to deal with complicated legal problems, an aptitude
for legal scholarship and writing, a familiarity with courts
and their processes, and substantial experience in the law.
Normally legal experience of at least fifteen years since
admission to the bar should be regarded as a minimum.
Commission shall not confine its consideration to persons in

any one type of legal work but shall seek out and consider a wide range of prospects in all segments of the practicing bar, in government service, on law school faculties, and on state courts and federal district courts. Whatever the background, the individual must have demonstrated an industriousness and a high level of competence in the law and be well regarded professionally.

4. Judicial Temperament. A proposed nominee must be, and must have a reputation for being, fair, openminded, and even tempered, and must have the ability and temperament to work collegially with fellow judges and also to work for long periods in relative isolation. The person should be free of fixed biases against any class of citizens or any religious or racial group.

5. The Current Needs of the Court. The Commission should ascertain the types of persons who should be added to the court in order to maintain or achieve a balance among the judges in professional backgrounds and capabilities, geographical distribution, and other factors thought to be significant for a balanced appellate court in the particular circuit. At least some of the five suggested nominees should be chosen to meet these needs, but only if they are otherwise well qualified.

6. Disqualifying Factors. The Commission shall eliminate from consideration any person who has been convicted of a felony or a misdemeanor other than a minor traffic violation, who uses alcohol excessively, who uses narcotics, who has been guilty of professionally unethical conduct, or who is not a citizen of the United States. A person over 60 years of age should be considered only in unusual circumstances and if exceptionally meritorious.

UNIVERSITY OF VIRGINIA
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SCHOOL OF LAW

DANIEL J. MEADOR
JAMES MONROE PROFESSOR OF LAW
804/924-3853

January 4, 1977

Memorandum to Griffin Bell:

The creation of a judicial nominating commission in each circuit will be an historic step. Because it is such a substantial break with former practices, it is especially important that the plan be implemented in a sound manner so as to enlist the confidence of the public and the lawyers of the country. The movement toward non-partisan merit selection would suffer a serious setback if the plan does not work well from the beginning. Every precaution should be taken against risk of failure. To avoid misunderstandings, potential criticisms, and unevenness in procedure, standards, and results, I suggest that the following features be incorporated:

1. The members of the commission in each circuit should be selected by the President with the advice of one or more seasoned lawyers who understand the work of appellate judges. *ok*

2. Each commission should receive the same set of specific, written instructions as to procedures for identifying and evaluating prospective nominees and as to the standards for selection. This written document should be more detailed than the Executive Orders. It could be an informal memorandum, and it need not be published. *ok*

3. The initial meeting of each commission should be attended by a representative of the President who is a lawyer familiar with the work of the Courts of Appeals, with the qualifications required for effective performance as a judge on those courts, and with the views of the President on judicial selection. This representative should discuss with the commission the instructions on procedures and standards, elaborating upon them as appropriate, to insure that all members of the commission fully understand their task and the desires of the President. *ok*

4. The President should be assisted in seeing that the commissions perform their functions and in acting on each commission's list of suggested nominees by a lawyer familiar with the Courts of Appeals and the requirements for effective judging on those courts. *ok*

ELECTROSTATIC REPRODUCTION MADE FOR
PRESERVATION PURPOSES

Federal Advisory Committee Act

Summary

The Federal Advisory Committee Act, Pub. L. 92-463, 86 Stat. 770, 5 U.S.C. App. I, imposes requirements and places restrictions on groups created for the purpose of advising or recommending action to federal officers, including the President. The terms of the Act would make it literally applicable to the United States Circuit Judge Nominating Commissions. Operating in accordance with the Act would impose burdens on the Commissions, which could interfere with their functioning as desired.

There are arguments against the applicability of the Act to these Commissions, despite its literal coverage of them. It also would be possible to seek a specific legislative exemption of the Commissions from the Act.

A decision must be made on whether to require the Commissions to operate in accordance with the Act, to take a position that the Act does not apply to these Commissions, or to seek a legislative exemption of the Commissions from the Act.

I. Literal Coverage of the Act.

The Act covers all "advisory committees". Section 3 of the Act defines an "advisory committee", in relevant part, as "any committee, board, commission, council, conference, panel, task force, or other similar group . . . which is . . . established or utilized by the President . . . in the interest of obtaining advice or recommendations for the President . . ."

This definition clearly embraces the United States Circuit Judge Nominating Commissions, which are (1) commissions (2) established and utilized by the President (3) in the interest of obtaining recommendations (of nominees for courts of appeals judgeships) for the President.

There is no exemption in the Act that could be read to embrace these Commissions.

II. Requirements and Restrictions Imposed by the Act.

The Act imposes various requirements on the President in setting up an advisory committee and various requirements on the committee itself in its operations. The following are only the most significant of these requirements:

- (1) The President must state a "clearly defined purpose" for the advisory committee, insure that membership on the committee is "fairly balanced

in terms of the points of view represented", make provisions to insure that the committee reaches independent judgments, attend to various technical matters (time for reports, etc.), and make provisions to insure adequate funding and staffing of the committee. See section 5(b), (c). *Can do*

These requirements pose no problem, since the Executive Order as now drafted meets all of them.

- (4) Unless the President otherwise provides in writing ^{must do this} and with stated reasons for his action, every advisory committee meeting must be open to the public; interested persons must be permitted to attend and make statements or file statements; and all minutes of, documents submitted to, and reports prepared by the committee, must be open to the public and available for copying. See section 10(a), (b), (d).

This requirement of "openness" would totally hamstring the Commissions were it not for the provision allowing the President to find that it should not apply. Currently, the grounds upon which the President may close meetings (and keep their minutes, documents, etc., from the public) are the grounds set out in the exceptions to the Freedom of Information Act, 5 U.S.C. 552(b). See section 10(d) of the Advisory Committee Act. One of those grounds is that an open meeting or disclosure of minutes, etc., would intrude upon personal privacy by disclosing matters of a personal nature. Almost surely, all meetings of Nominating Commissions could be closed on this ground, since the very business of

these Commissions is to discuss the character, qualifications, and personality of potential nominees.*

- (5) A designated "officer or employee of the Federal Government" must "chair or attend" every meeting of an advisory committee, and must have authority to adjourn the meeting. Moreover, no meeting can be held without the advance approval of this government official or employee. See section 10(e), (f).

This is perhaps the most onerous provision in the context of the Nominating Commissions, for it would intrude a federal official into their deliberations. This would be contrary to the whole concept of the Commissions, which is that they be totally nonpartisan, independent bodies operating without any contact with or interference from the Executive Department. It might be possible to comply with the language but not the spirit of the provision, for instance by having a low-level federal employee officially "approve" every meeting

*After March 12, 1977, the grounds for closing meetings and denying access to minutes, etc., will be those grounds set forth in the "Government in the Sunshine Act", Pub. L. 94-409, 90 Stat. 1241 (September 13, 1976). See section 5(c) of the Sunshine Act, amending section 10(d) of the Advisory Committee Act. The Sunshine Act grounds are very similar to those in the Freedom of Information Act, and include the "matters of a personal nature" ground. See section 3(c) (6) of the Sunshine Act.

and "attend" every meeting for a few minutes, but that seems a silly exercise. (Moreover, this procedure may not comply even with the language of the provision. The Act states that the federal employee must have power to adjourn a meeting at any time, and that no meeting may be "conducted" in the employee's absence; both statements suggest constant attendance by the employee throughout a meeting.) *cannot do*

- (6) An advisory committee automatically goes out of existence after two years unless the President expressly renews it. If the committee is renewed, it must file a new charter again before meeting or taking further action. See section 14(c).

III. Arguments Against the Applicability of the Act.

There are two arguments against the applicability of the Act to these Commissions despite its literal reach. One argument is constitutional, while the other may be termed an argument of "statutory construction".

A. The constitutional argument. The Constitution expressly states that the President shall nominate Supreme Court Justices and inferior federal officers (which term includes federal judges), and that the Senate shall advise and consent to his nominations. This is an example of the "checks" written into the document: the Congress, acting through the Senate, exercises control over the President's

nominations through its power to refuse consent. At the same time, however, it represents the principle of "separation of power" embodied in the document: the respective powers of the President and the Congress over appointments are clearly delineated.

The constitutional argument against the applicability of this Act to these Commissions runs as follows: (1) When the Constitution expressly confers a power upon the President, here the power of nomination, and also states the manner in which the Congress may control that power, here by the power to refuse consent, Congress cannot exercise additional control over the President's power. (2) The use of United States Circuit Judge Nominating Commissions is the President's chosen method of exercising his constitutional power of nomination; application of the Act to those Commissions would permit Congress to exercise some control of the President's nominations beyond its constitutional power of refusing consent. (3) Therefore, application of the Act would violate the principle of separation of powers set forth in the Constitution.

Attorney General Saxbe relied upon this argument in deciding that the Act "should not be interpreted to extend to" the American Bar Association's Committee on the Federal Judiciary despite the apparent literal coverage by the Act

(because the Justice Department and the President utilize the Committee to obtain recommendations on prospective nominees to federal judgeships). Attorney General Saxbe's decision is stated in an October 9, 1974 letter from him to William Reese Smith, Jr., then the Chairman of the ABA Committee. The Attorney General based his decision upon an opinion rendered by the Office of Legal Counsel under Antonin Scalia.*

B. The statutory construction argument. In some cases the courts have held that a situation literally within the terms of a statute nevertheless was not in fact covered by the statute because Congress had not considered the situation in passing the statute and would not have intended the statute to cover the situation had it considered the possibility. It is possible that the literal applicability of the Federal Advisory Committee Act to these Commissions is such a situation. The legislative history of the Act

*The Attorney General's letter to Smith and the OLC's opinion underlying it could be termed changes of position by both the Attorney General and OLC. In a previous letter of February 25, 1974, to John Sutro, then Chairman of the ABA Committee, Attorney General Saxbe relied upon an earlier OLC opinion (by Robert Dixon) in deciding that the Act did apply to the ABA Committee. In this earlier letter no mention was made of the Constitutional argument.

has not been studied, but Congress probably intended the Act to cover commissions and other groups which participate in or make recommendations about the formation of government policies, regulations, or courses of action. There is no indication that Congress intended to address the completely different situation of commissions which would advise the President solely with respect to his exercise of his constitutional power of appointment. Indeed, there probably was no comparable government commission in existence at the time the Act was passed (1972), so it is entirely possible that Congress never considered this situation.*

IV. Options

The following are some of the options available with respect to this Act:

- (1) Comply fully with the Act in setting up and operating the Commissions . . .

Pro: The Carter Administration would be "complying fully with the law" without any effort to make possibly tortured constitutional or statutory arguments to avoid compliance.

*The ABA Committee on the Federal Judiciary was in existence, performing an advisory function similar to that envisioned for these Nominating Commissions. The argument could be made, therefore, that Congress' failure to exempt the ABA Committee from the Act, while exempting certain other

Con: (a) Compliance may prove expensive or time-consuming, and certain requirements (e.g., the requirement that a federal employee or official attend all meetings) could interfere with the desired manner of operation of the Commissions.

(b) Complying with the Act would be a concession that Congress can impose conditions on the President's exercise of his constitutional power of nomination, at least to the extent of dictating some procedures for the exercise of that power.

(c) It would appear somewhat contradictory for these Nominating Commissions to comply with the Act while the ABA Committee, which probably will be performing much the same function even after these Commissions are operating, does not comply with the Act.

Footnote (Con'd)

groups (section 4(b) of the Act), indicates that it intended the ABA Committee and all other groups performing a similar function to be covered. The existence of the ABA Committee at the Act's passage, therefore, severely undercuts the statutory argument in the text. (According to an internal OLC memorandum, the Chairman of the House Government Operations Committee, which considered the Act, has stated since the Act's enactment that it was not intended to cover the ABA Committee. But such a post-enactment statement would carry little weight in an argument over whether the ABA Committee and similar groups in fact are covered by the Act).

Go with this J.C.

- (2) Do not comply with the Act . . .

Pro: (a) The current position of the Executive Branch, that Congress should not be considered to have attempted a possibly unconstitutional restriction of the President's power of nomination, would be preserved.

(b) The Commissions would save the time that might be lost and the expense that might be occasioned by compliance.

Con: This course could result in a confrontation between the executive and legislative branches over applicability of the Act, and in lawsuits by public interest groups to attempt to force compliance.

- (3) Seek a legislative exemption from the Act

Pro: If successful, this would avoid the time and expense of compliance, and the possibility of an Executive-Legislative confrontation or lawsuits.

Con: (a) There could be substantial delay if implementation of the Commissions were held up awaiting an exemption.

(b) This would amount to a concession of Congress' power to impose conditions on the President's exercise on his constitutional power of nomination.

THE WHITE HOUSE
WASHINGTON

January 21, 1977

MEMORANDUM FOR: President Carter
FROM: Stuart Eizenstat
THROUGH: Rick Hutcheson
Jody Powell
SUBJECT: Vietnam Veterans Jobs Program

*I believe we
can do this as
items under consideration
even if we are not ready to
do a final draft
JEP*

JPI- I suggested to Bob Lipschutz and Jody that we should announce the Vietnam War Veterans Jobs Program (which was going to be a part of our economic stimulus package in any event) at or about the time you issued your Vietnam pardon. Jody has agreed and wanted me to get you a summary of such a program, as worked out by Ray Marshall, for use in your AP interview on January 22, 1977.

My suggestion is that you state the broad outlines of such a program tomorrow, with enough detail to make it clear that this is a serious program, but that you're not too specific since we would like to staff it out more fully. I received the material from Ray Marshall the morning of the 21st. The reasons for such early action are:

1) If we are to fully put the trauma of Vietnam behind us, we must not only be concerned with those who refused to serve out of conscience, we must be concerned with the plight of those who honorably served in the armed forces but have had difficulty obtaining employment.

2) Politically it would be helpful to have an early announcement both to offset pardon criticism, and to show sympathy for a group many people feel are more deserving of sympathy than ~~this~~ pardoned.

3) There is a great need for such a program, which you talked about during the campaign. For all veterans between 20 and 24 the unemployment rate is 18% compared to non-veterans of the same age. Unemployment among minority Vietnam-era veterans is 50% higher than for their non-veteran counterparts.

January 21, 1977

I am attaching Ray Marshall's program, with my summary and comments being provided herein in this memorandum.

1) Increased public service job opportunities for Vietnam War veterans.

As part of the economic recovery package, there will be a request for an additional 290,000 public service jobs under Titles II and VI of the Comprehensive Employment and Training Act (CETA) in FY 1977 and an additional 125,000 slots for FY 1978, a portion of which will go to Vietnam-era veterans. You could announce tomorrow that special targeting of such job opportunities will be provided for Vietnam-era veterans.

What portion?

In addition, the fiscal stimulus package will include an increase in the Title III CETA program from 40,000 slots to 60,000 slots in 1978. This Title specifically includes veterans along with migrants and Indians.

I see no reason why you should not announce these items since they will clerally be in the stimulus package.

2) Introduce a new program for Vietnam-era veterans involving the private sector directly called HIRE (Hope through industry retraining and employment).

Ray Marshall has developed and gotten tentative agreement from the AFL-CIO staff for this innovative program, which could be eventually broadened to include non-veterans as well. Under this program it is envisioned that 80,000 jobs would be created at a cost of only \$120 million, by an effort to directly involve the large corporations of this country, perhaps the existing National Alliance of Businessmen (NAB). Under this program for each Vietnam-era veteran hired, the Federal government would pay a figure to compensate for the additional training and retention costs to keep such an unemployed person. Rather than bog down in an exhausting effort to determine actual costs, the government would pay \$5.00 per veteran hired for each day of employment provided to such a person up to a maximum of twelve months. In order to receive the Federal assistance, there would be a requirement that the employment of target group members must not result in the displacement of any worker who is currently employed by the firm, who has been laid off, or who is on strike.

Because additional staff work on this is necessary (for example, there should be a requirement that a target group be unemployed for a certain period of time or have other indicia of financial distress so that we make certain that we will help the correct category of people), we should meet with the Veterans Organization, the NAB and others, including people on the Hill, before the details of such a

January 21, 1977

program are announced. This can be done by the time the new fiscal stimulus package is announced. I would simply say at this point that your Administration is developing a major initiative, with Federal financial incentives, to hire the Vietnam-era unemployed.

3) National enrollment goal for veterans.

Ray has suggested that you announce a national enrollment goal of 35% of new public service employment jobs for veterans.

This certainly needs additional staffing, and I will have some questions about such a quota system and whether this will lead to demands from other groups for such preferential treatment, including women.

However, it seems to me to be completely appropriate to suggest that you will urge CETA prime sponsors to voluntarily increase their employment of Vietnam-era veterans in the expanding job service employment program you are proposing as part of your stimulus package.

4) Use of disabled Vietnam-era veterans in the employment service offices.

Under this portion of the program the Secretary of Labor would establish outreach units staffed by disabled Vietnam war veterans within the employment services throughout the country, both to give them gainful employment and to help identify other disabled veterans in need of employment services. This would cost an estimated \$20 million per year. The job-developed effort would directly hire 2000 disabled Vietnam-era veterans who would in turn be expected to generate 40,000 jobs for their fellow disabled veterans.

5) Administrative Measures

There will be a number of administrative measures which could be included, some of which you could mention tomorrow. I have indicated by the use of the word "yes" to indicate those I think you might use tomorrow, with the others requiring additional staffing.

(a) Strengthen the administration of programs to insure enforcement of current affirmative action provisions requiring the hiring of veterans by firms with Federal contracts. (Yes)

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b) Early appointment of a Deputy Assistant Secretary of Labor for Veterans Affairs with specific emphasis on the job problems of Vietnam veterans. (Yes)

c) Encourage veterans organizations to join CETA prime sponsor manpower planning councils. (Yes)

d) Encouraging federal agencies to act as training sites or work experience programs for veterans and pledging that a certain percentage of new Federal hires be set aside for veterans. (Needs further study)

e) Increased efforts to develop better statistics on the number and characteristics of disabled veterans so as to better target services. (Needs further study)

f) Working to include services to veterans in the design of special manpower programs such as Title IX of the Older Americans Act. (Needs further study)

It should be stressed again that Ray Marshall considers all of this to be part of the fiscal stimulus package. It is not an add on to other things presented to be part and parcel of the original fiscal stimulus package.

cc: Vice President Mondale
Jody Powell ✓
Bob Lipshutz
Jack Watson
Bert Carp
David Rubenstein
B. Lance